Karuppannan a/l Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors (Sundaram a/l Marappa Goundan & Anor, interveners and Raya Realti, third party) and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–39 OF 2007(W) AND 02–40 OF 2007(W)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND ABDUL AZIZ MOHAMAD FCJ
8 JUNE 2009

Civil Procedure — Pleadings — Defects in pleadings — Whether other party caught by surprise or embarrassed or prejudiced — Whether defect fatal

Contract — Collateral contract — Extrinsic evidence rule — Separate oral agreement constituting condition precedent upon exercise of option — Proof — Evidence Act 1950 s 92(b)

Contract — Deposit — Amount — Deficiency in amount of deposit — RM35,000 paid instead of actual sum of RM35,035 — Whether amounted to waiver of RM35

Contract — Option to purchase — Sale and purchase of property — Whether option exercised in time — Whether binding contract arose — Whether lodging of private caveat by third party entitled seller to revoke option — Whether conditional option lapsed on failure of condition

Contract — Sale and purchase of land — Option — Whether option exercised in time — Whether binding contract arose — Whether lodging of private caveat by third party entitled seller to revoke option — Whether conditional option lapsed on failure of condition

Land Law — Sale of land — Option — Whether option exercised in time — Whether binding contract arose — Whether lodging of private caveat by third party entitled seller to revoke option — Whether conditional option lapsed on failure of condition

The six defendants being the owners of a piece of land, appointed Raya

Realti, a firm of real estate agents, to sell the land at RM30,000 per acre. On 9 October 1988 Raya Realti gave one Sundaram and one Sinnan ('the intervener-plaintiffs') a written option to purchase the land at RM28,000 per acre ('the first option'). The total purchase price was RM350,350. The intervener-plaintiffs made a deposit payment of RM35,000 (RM35 less than the exact 10%). On 10 October 1988 Raya Realti gave Karuppannan and Amchiappan ('the plaintiffs') another written option to purchase the same land at RM28,000 per acre ('the second option'). The plaintiffs paid RM36,400 as deposit and lodged a private caveat on the land. Subsequently, the six defendants purported to terminate the sale unless the plaintiffs' private caveat was removed. The plaintiffs and the intervener-plaintiffs respectively commenced actions for specific performance and damages against the six defendants and Raya Realti. The six defendants pleaded that: (i) Raya Realti was not authorised to sell the land at a price lower than RM30,000 per acre; (ii) the second option was a conditional option because before granting it one Rajandran from Raya Realti had represented to the plaintiffs that it was subject to the prior rights of the intervener-plaintiffs under the first option. The learned trial judge found concluded contracts in favour of plaintiffs and the intervener-plaintiffs. However, since the intervener-plaintiffs were first given an option, specific performance was given in favour of the intervener-plaintiffs and only damages for the plaintiffs. The Court of Appeal however found that there was no binding contract in favour of the plaintiffs and intervener-plaintiffs and therefore allowed the six defendants' appeal and set aside the award of damages and the order of specific performance. The intervener-plaintiffs obtained leave to appeal on the following questions: (1) 'Whether after the grant of an option to purchase land a vendor can unilaterally repudiate the option, after the due exercise of the option, on the ground that the caveat has been lodged by a third party'; and (2) 'Whether an acceptance by the vendor of a sum that is marginally less than the strict calculation of 10% of the purchase price constitutes a waiver of the marginal difference and estops the vendor from raising the said non-payment of the said marginal difference as a defence to specific performance'. The intervener-plaintiffs obtained leave to appeal on the following questions: (1) 'When a sale and purchase of land is by way of an oral agreement and such transaction is done through an option to purchase whether such an option to purchase can be treated merely as evidence which does not require to be specifically pleaded'; and (2) 'In a case of sale and purchase of land, when there are two options given by the vendor to two different parties, can the one option be treated as conditional upon non-performance of the other option'.

Held, allowing the intervener-plaintiffs' appeal against the defendants with costs here and court below and dismissing the plaintiffs' appeal with costs to the defendants and dismissing the plaintiffs' appeal against the

intervener-plaintiffs with no order as to costs:

(1) The parties had always proceeded on the basis that RM35,000 was acceptable as full satisfaction of 10% of the total purchase price. That amounted to a waiver of the RM35. It was clear that Raya Realti, as the six defendants' agent, were not concerned to fix the deposit at the exact sum of RM35,035 (see para 22).

(2) Provided the option was exercised in time, there was a binding contract. The lodging of the caveat did not entitle the six defendants to refuse to proceed with the sale (see para 26).

(3) The plaintiffs' option contained sufficient essential terms for it to become a binding or absolute contract upon payment of the required sum by the due date, whether or not a formal sale and purchase agreement was to follow. The plaintiffs however did not plead the option as the basis of their claim but pleaded instead an oral agreement. There was no evidence of any oral agreement. However, by admitting that there were requests for completion of 'the alleged agreement' the six defendants evinced their understanding that the agreement alleged by the plaintiffs was the option. The six defendants knew the case that they had to meet and were not embarrassed or misled by the plaintiffs' averment of an oral agreement (see paras 30–32).

(4) The purpose of a pleading is to enable the other party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. The plaintiffs' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the very outset they knew that it was the second option that was the true basis of the plaintiffs' claim. This was nothing but a trivial issue (see para 37).

(5) The second option was a conditional contract. Proviso (c) to s 92 of the Evidence Act 1950 allows proof to be given of a separate oral agreement constituting condition precedent. In granting the second option Rajandran had imposed the oral condition and the plaintiffs accepted the option. As the second option was subject to the first option, and as the first option was exercised in time, the second option ceased to be binding on the six defendants (see paras 43–44).

[Bahasa Malaysia summary

Keenam-enam defendan yang merupakan pemilik sebidang tanah, melantik Raya Realti, sebuah firma ejen-ejen harta tanah, untuk menjual tanah tersebut pada harga RM30,000 seekar. Pada 9 Oktober 1988, Raya Realti memberikan kepada Sundaram dan Sinnan ('plaintif-plaintif pencelah') satu

A opsyen untuk membeli tanah tersebut secara bertulis pada harga RM28,000 seekar ('opsyen pertama'). Jumlah keseluruhan harga belian ialah RM350,350. Plaintif-plaintif pencelah membayar deposit sebanyak RM35,000 (RM35 kurang daripada 10%). Pada 10 Oktober 1988 Raya Realti memberikan kepada Karuppannan dan Amchiappan B ('plaintif-plaintif') satu lagi opsyen secara bertulis untuk membeli tanah yang sama pada harga RM28,000 seekar ('opsyen kedua'). Plaintif-plaintif membayar RM36,400 sebagai deposit dan memasukkan kaveat persendirian atas tanah tersebut. Kemudiannya, keenam-enam defendan berniat untuk membatalkan jualan tersebut melainkan kaveat persendirian plaintif-plaintif C dipotong. Plaintif-plaintif dan plaintif-plaintif pencelah masing-masing mengambil tindakan untuk pelaksanaan spesifik dan ganti rugi terhadap keenam-enam defendan dan Raya Realti. Keenam-enam defendan memplid bahawa: (i) Raya Realti tidak diberi kuasa untuk menjual tanah tersebut pada D harga yang lebih rendah daripada RM30,000 seekar; (ii) opsyen kedua merupakan opsyen bersyarat kerana sebelum memberikannya, Rajandran daripada Raya Realti telah menyatakan kepada plaintif-plaintif bahawa ia tertakluk kepada hak-hak terdahulu plaintif-plaintif pencelah di bawah opsyen pertama. Hakim yang bijaksana mendapati kontrak-kontrak telah E termeterai dengan plaintif-plaintif dan plaintif-plaintif pencelah. Walau bagaimanapun, memandangkan plaintif-plaintif pencelah diberikan opsyen pertama, pelaksanaan spesifik diberikan bagi pihak plaintif-plaintif pencelah dan hanya ganti rugi diberikan kepada plaintif-plaintif. Mahkamah Rayuan walau bagaimanapun mendapati bahawa tiada kontrak yang mengikat F plaintif-plaintif dan plaintif-plaintif pencelah dan oleh itu, membenarkan rayuan keenam-enam defendan dan mengetepikan award ganti rugi dan juga perintah pelaksanaan spesifik. Plaintif-plaintif pencelah mendapat kebenaran untuk merayu atas persoalan-persoalan berikut: (1) Sama ada selepas mendapat opsyen untuk membeli tanah penjual boleh membatalkan opsyen G tersebut di sebelah pihak sahaja, setelah opsyen tersebut dilaksanakan, atas dasar bahawa kaveat telah dimasukkan oleh pihak ketiga; (2) Sama ada penerimaan oleh penjual dengan jumlah yang kurang sedikit daripada kiraan 10% daripada harga belian menjadikannya suatu pelepasan terhadap perbezaan yang sedikit itu dan mengestop penjual daripada membangkitkan H perbezaan yang sedikit tersebut sebagai pembelaan terhadap pelaksanaan spesifik. Plaintif-plaintif pencelah mendapat kebenaran untuk merayu atas persoalan-persoalan berikut: (1) Apabila suatu jual beli tanah adalah menerusi perjanjian lisan dan transaksi tersebut dibuat melalui suatu opsyen untuk membeli sama ada opsyen untuk membeli tersebut boleh dianggap hanya I sebagai keterangan yang tidak perlu diplid secara spesifik; dan (2) Dalam kes jual beli tanah, apabila adanya dua opsyen yang diberikan oleh penjual kepada dua pihak yang berlainan, bolehkah satu opsyen tersebut dianggap tertakluk kepada ketaklasanaan opsyen yang satu lagi.

Diputuskan, membenarkan rayuan plaintif-plaintif pencelah terhadap defendan-defendan dengan kos di sini dan Mahkamh Rayuan dan menolak rayuan plaintif-plaintif dengan kos kepada defendan-defendan dan menolak rayuan plaintif-plaintif terhadap plaintif-plaintif pencelah tanpa perintah untuk kos:

(1) Pihak-pihak sentiasa meneruskan atas dasar bahawa RM35,000 adalah mencukupi sebagai 10% daripada keseluruhan harga belian. Itu merupakan pelepasan terhadap RM35. Adalah jelas bahawa Raya Realti, sebagai ejen kepada keenam-enam defendan, tidak mengutamakan untuk menetapkan deposit tersebut pada jumlah tepat RM35,035 (lihat perenggan 22).

(2) Dengan syarat opsyen tersebut dilaksanakan tepat pada masanya, ada kontrak yang mengikat. Memasukkan kaveat tidak memberi hak kepada keenam-enam defendan untuk tidak meneruskan jualan tersebut (lihat perenggan 26).

(3) Opsyen plaintif-plaintif mengandungi terma-terma penting yang mencukupi untuk menjadikannya kontrak mengikat atau mutlak dengan pembayaran jumlah yang dikehendaki pada tarikh yang ditetapkan, sama ada diikuti dengan suatu perjanjian jual beli yang formal atau tidak. Plaintif-plaintif walau bagaimanapun tidak memplid opsyen tersebut sebagai dasar tuntutan mereka tetapi sebaliknya memplid perjanjian lisan. Tiada keterangan berkaitan sebarang perjanjian jual beli. Tetapi, dengan mengakui adanya permintaan untuk penyempurnaan 'perjanjian yang didakwa itu' keenam-enam defendan telah memperlihatkan persefahaman mereka bahawa perjanjian yang didakwa oleh plaintif-plaintif merupakan opsyen tersebut. Keenam-enam defendan maklum akan kes yang perlu mereka hadapi dan tidak disusahkan atau diperdaya oleh penegasan plaintif-plaintif tentang penjanjian lisan tersebut (lihat perenggan 30–32).

(4) Tujuan suatu pliding adalah untuk membolehkan pihak yang satu lagi sedia maklum dengan jelas akan kes yang perlu dihadapinya. Kecacatan dalam pliding yang tidak membuatkan pihak yang satu lagi terperanjat atau disusahkan atau diprejudiskan tidak mendatangkan kemudaratan ke atas kes yang diplidkan oleh pihak tersebut. Kegagalan plaintif memplid opsyen tersebut tidak menyusahkan atau memprejudis keenam-enam defendan dalam apa jua cara pun. Sejak dari mula lagi mereka sudah maklum bahawa opsyen kedua yang menjadi dasar sebenar tuntutan plaintif. Ini adalah isu yang remeh (lihat perenggan 37).

(5) Opsyen kedua merupakan kontrak bersyarat. Proviso (c) kepada s 92 Akta Keterangan 1950 membenarkan bukti diberikan berkenaan kewujudan perjanjian lisan yang berasingan yang menjadi syarat

duluan. Dalam memberikan opsyen kedua Rajandran telah mengenakan syarat secara lisan tersebut dan plaintif-plaintif menerima opsyen tersebut. Memandangkan opsyen kedua tertakluk kepada opsyen pertama, dan memandangkan opsyen pertama dilaksanakan tepat pada masanya, opsyen kedua tidak lagi mengikat keenam-enam defendan (lihat perenggan 43–44).]

Notes

For a case on sale and purchase of property, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4532.

For cases on amount of deposit, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3435–3453.

For cases on defects in pleadings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5327–5331.

For cases on extrinsic evidence rule, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2987–2988.

For cases on option for sale and purchase of land, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4869–4884.

For cases on option for sale of land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4107–4123.

Cases referred to

Subramaniam Chettiar & Ors v JC Chang Ltd [1969] 2 MLJ 176, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 92(c)

Appeal from: Civil Appeal No W-02–728 of 2003 (Court of Appeal, Putrajaya)

Mura Raju (Mura Raju & Co) for the plaintiffs.

DP Vijandran (Susan Joseph with him) (Azman Joseph & Associates) for the intervener-plaintiffs.

Bastion Pius Vendargon (Dennis Appadurai with him) (Dennis Nik & Wong) for the defendants.

Prasad Abraham (Prasad Abraham & Associates) for the third party.

Abdul Aziz Mohamad FCJ (delivering judgment of the court):

[1] This case concerns a land in Cameron Highlands measuring 12 acres two roods two poles (12.5125 acres) belonging to six persons who became defendants in this case and who will therefore be referred to as 'the six defendants'. On 5 October 1988 they appointed Raya Realti, a firm of real estate agents, to sell the land at RM30,000 per acre.

[2] On 9 October 1988 Raya Realti gave to two persons a written option to purchase the land at RM28,000 per acre. The option was to be exercised by 18 October 1988 by paying ten per cent of the total purchase price. The total purchase price was not stated in the option, but since the land measures 12.5125 acres, the total purchase price would be RM350,350, and ten per cent of it would be RM35,035. The two persons were Sundaram a/l Marappa Goundan and Sinnan a/l Kandan. The option given to them will be referred to as 'the first option'.

[3] On 10 October 1988 Raya Realti gave to two other persons another written option to purchase the same land at RM28,000 per acre. The option was to be exercised by 25 October 1988 by paying ten per cent of the total purchase price, which would also be RM35,035. The two persons were Karuppannan a/l Ramasamy and Amchiappan a/l Sellapan. As they became the plaintiffs in this case, they will be referred to as 'the plaintiffs'. The option given to them will be referred to as 'the second option'.

[4] On 15 October 1988, five days after obtaining the option, the plaintiffs lodged a private caveat on the land.

[5] On 19 October 1988 the solicitors for the six defendants, Skrine & Co, returned two cheques to Raya Realti for onward transmission to the aforesaid Sundaram and Sinnan, holders of the first option, saying in their letter that their clients were not proceeding with the sale of the land unless and until the plaintiffs' private caveat was removed. The two cheques totalled RM35,000, each being for RM17,500, and were cheques for paying ten per cent of the total purchase price.

[6] On 4 November 1988 the plaintiffs, maintaining that before 25 October 1988, the date of expiry of the second option, they had paid to Raya Realti slightly more than ten per cent of the total purchase price, namely, RM36,400, and alleging that the six defendants and Raya Realti had refused to complete the agreement for sale, brought an action against the six defendants and Raya Realti, who became the seventh defendant, for specific performance, or, alternatively, for damages for breach of contract. Against the plaintiffs' claim, the six defendants pleaded as their defences that the giving of the option was not done in the course of Raya Realti's employment as their agent, that Raya Realti were not authorised to sell the land at a price lower than RM30,000 per acre, that the option given to the plaintiffs was a conditional option because before granting it Raya Realti had represented to them that it was subject to the prior rights of Sundaram and Sinnan under the first option, and that the plaintiffs did not exercise the option before its

A expiry on 25 October 1988. The six defendants counterclaimed against the plaintiffs for removal of their caveat and for damages on account of the caveat.

B [7] In June 1991, by way of third-party proceedings, the six defendants brought a claim against Raya Realti for damages for granting to the plaintiffs the second option to sell the land at RM28,000 per acre whereas the authorised price was RM30,000 per acre and for granting the option when there was already a valid option, the first option, granted to Sundaram and Sinnan. Sinnan had died in January 1991.

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[8] In 1998, when the trial of the action had proceeded a little way, Sundaram and Sinnan's widow, Palaniammah a/p Muthan, as administrator of Sinnan's estate, came into the action as intervener-plaintiffs and filed their statement of claim, which was against the six defendants, on 2 July 1998. For
D convenience, we will speak of the intervener-plaintiffs as referring also to Sinnan. The intervener-plaintiffs contended, inter alia, that the option given to them, the first option, had been exercised before its expiry on 18 October 1988 by the payment of RM35,000 on 9 and 15 October 1988, and averred
E that the six defendants no longer wished to proceed with the sale of the land. The intervener-plaintiffs prayed for an order of specific performance against the six defendants. Against the intervener-plaintiffs' claim, the defences that the six defendants pleaded were essentially that Raya Realti were not their agent, or, alternatively, that Raya Realti were not authorised to sell the land
F at a price lower than RM30,000 per acre.

[9] In January 1999, by way of third-party proceedings, the six defendants brought a claim against Raya Realti for damages for granting to the intervener-plaintiffs the first option when they were not an agent or employee
G of the six defendants or, alternatively, for granting the option to purchase at RM28,000 per acre whereas the authorised price was RM30,000 per acre.

[10] The learned trial judge found, as regards the plaintiffs' claim, that they had exercised the second option before the deadline of 25 October 1988 by
H paying RM34,600 into Raya Realti's bank account and that therefore there was a concluded contract. The learned judge did not deal with the defence as to Raya Realti's authority but we would assume, from the finding of a concluded contract, that he accepted that Raya Realti had the six defendants' consent to sell the land at RM28,000 per acre.

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[11] As regards the intervener-plaintiffs' claim, the learned trial judge specifically found as a fact that the six defendants agreed to the price of RM28,000 per acre, thereby impliedly finding that Raya Realti were the six defendants' agent. He found there was a concluded contract.

[12] The learned trial judge therefore found that the six defendants were liable both to the plaintiffs and the intervener-plaintiffs for breach of contract, but since it was the intervener-plaintiffs who were the first to be given an option, he ordered specific performance against the six defendants in favour of the intervener-plaintiffs and only awarded damages for the plaintiffs against the six defendants and also against Raya Realti the seventh defendant. He consequently dismissed the six defendants' third party claims against Raya Realti and counterclaim against the plaintiffs as regards the caveat.

[13] The six defendants appealed to the Court of Appeal against the entire decision of the High Court, that is to say, the orders made against them in favour of the plaintiffs and the intervener-plaintiffs and the consequent dismissal of their third-party claims against Raya Realti and counterclaim against the plaintiffs. The plaintiffs cross-appealed for specific performance. Raya Realti cross-appealed against the award of damages against them as the seventh defendant in favour of the plaintiffs.

[14] The Court of Appeal found there was no binding or concluded contract in favour of the plaintiffs and intervener-plaintiffs and therefore allowed the six defendants' appeal and set aside the award of damages and the order of specific performance. Consequently the appeal on their counterclaim against the plaintiffs was allowed and the plaintiffs' private caveat was ordered to be removed and damages on account of the private caveat were ordered, and the plaintiffs' cross-appeal for specific performance was dismissed. The Court of Appeal dismissed the six defendants' appeal against the dismissal of their third-party claims against Raya Realti, finding that in any case they had apparent or ostensible authority to bind the six defendants to a lower price of RM28,000 per acre. The Court of Appeal made no mention in their judgment of Raya Realti's cross-appeal against the award of damages against them in favour of the plaintiffs.

[15] Only the plaintiffs and intervener-plaintiffs applied for and obtained leave to appeal to this court. The plaintiffs' appeal is appeal No 39, and is directed also against the dismissal of their counterclaim for specific performance, and the intervener-plaintiffs' appeal is appeal No 40. There is no appeal by the six defendants, so that the question of their third-party claims against Raya Realti does not arise in the present appeals. The plaintiffs' appeal is directed against the six defendants only, so that the question of damages for the plaintiffs against Raya Realti does not arise in the present appeals. In short, as their counsel, who was present during the hearing of the appeals, said, Raya Realti are not jeopardised by these appeals.

[16] After the appeals had reached this court the second intervener-plaintiff, the widow and administrator of the estate of Sinnan, died on 2 October 2008, and their son, Selva Balan a/l Sinnan, has now been substituted as the second intervener-plaintiff-appellant.

THE INTERVENER-PLAINTIFFS' APPEAL

[17] We shall deal first with the intervener-plaintiffs' appeal. For this appeal, the following facts need to be set out, some of which have been mentioned earlier.

[18] The intervener-plaintiffs' option, the first option, was dated 9 October 1988. It was to be exercised by 18 October 1988 by paying ten per cent of the total purchase price, which, although this was not stated in the option, would come to RM350,350. Ten per cent of that would strictly be RM35,035. A cheque for RM17,500 was acknowledged in the option as having been received. It was in the name of Raya Realti, the six defendants' agent. It was dated 9 October 1988. Another cheque of the same date, also for RM17,500, was issued in the name of Skrine & Co, the six defendants' solicitors. The cheque in the name of Raya Realti was paid into Raya Realti's client's account and Raya Realti issued a client's account cheque dated 15 October 1988 for RM17,500 in the name of Skrine & Co. By 15 October 1988, therefore, Skrine & Co were in possession of two cheques for RM35,000 on behalf of the six defendants. It was RM35 less than the exact ten per cent of the total purchase price. That was three days before the last date for the intervener-plaintiffs to exercise the option. On 19 October 1988 Skrine & Co returned the two cheques to Raya Realti, saying that the six defendants were not proceeding with the sale unless and until the plaintiffs' private caveat was removed.

[19] The intervener-plaintiffs obtained leave to appeal on three leave-questions. It is expedient to deal first with questions 2 and 3.

QUESTIONS 2 AND 3

[20] These relate to the deficiency of RM35 and are as follows:

(2) Whether an acceptance by the vendor of a sum that is marginally less than the strict calculation of 10% of the purchase price constitutes a waiver of the marginal difference and estops the vendor from raising the said non-payment of the said marginal difference as a defence to specific performance; and

(3) Whether in any case, the *de minimis* rule applies to such a marginal difference.

[21] The question of the deficiency was not raised in the six defendants' defence or during the trial and no evidence was led on it. It was raised only during submission. The trial judge ignored it. He only dealt with the six defendants' pleaded defences as to Raya Realti's status and authority, which were their only pleaded defences. The Court of Appeal, however, said concerning the deficiency: 'It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with'.

[22] The intervener-plaintiffs' counsel went to great lengths to point out various circumstances to persuade us that they show that the parties had always proceeded on the basis that the sum of RM35,000 was acceptable as full satisfaction of ten per cent of the total purchase price. We will not set out the circumstances and will only say that it is clear to us that that was the case. They amounted to a waiver of the RM35. If that had not been the case the six defendants would have raised the deficiency as a defence. We wish particularly to mention that on 9 October 1988 Raya Realti, in forwarding to Skrine & Co the cheque for RM17,500 in their name, also forwarded, in a form, the particulars of the vendor and purchaser. In that form the purchase price was given as '$350,000 (approx)' and the deposit was given as '$35,000 (10%) (approx)'. It is a clear indication that Raya Realti, as the six defendants' agent, were not concerned to fix the deposit at the exact sum of RM35,035.

[23] We would therefore answer question 2 in the affirmative. There is no need to answer question 3 to decide in favour of the intervener-plaintiffs the question of the deficiency.

QUESTION 1

[24] This question is as follows:

> Whether after the grant of an option to purchase land a vendor can unilaterally repudiate the option, after the due exercise of the option, on the ground that the caveat has been lodged by a third party.

[25] It arose from the following statement in the Court of Appeal's judgment:

> I am also of the view that the returning of the two cheques... by Messrs Skrine & Co to (Raya Realti) vide their letter dated 19.10.1988 would show that there was no acceptance of the ten per cent deposit.

As has been stated, those cheques were returned because the six defendants did not wish to proceed with the sale because of the presence of the plaintiffs' private caveat.

[26] In our judgment, provided the option had been exercised in time, there was a binding contract, and the lodging of the caveat did not entitle the six defendants to refuse to proceed with the sale. All that the intervener-plaintiffs had to do to exercise the option and turn it into a binding or absolute contract was to tender payment of the ten per cent deposit by 18 October 1988. This they did. That the six defendants' solicitors chose not to bank in the cheques but instead to return them to Raya Realti did not change the fact that the option had been exercised. We respectfully disagree with the Court of Appeal that the return of the cheques signified no 'acceptance' of the ten per cent deposit.

[27] We therefore allow the intervener-plaintiffs' appeal.

THE PLAINTIFFS' APPEAL

[28] It was on three grounds that the Court of Appeal found that there was no concluded contract and set aside the orders of the High Court in favour of the plaintiffs. Each of the three grounds gave rise to a leave-question, so that there are three leave-questions.

QUESTION 1

[29] Question 1 is as follows:

(1) When a sale and purchase of land is by way of an oral agreement and such transaction is done through an option to purchase whether such an option to purchase can be treated merely as evidence which does not require to be specifically pleaded.

[30] We wish to say at the outset that it is clear to us that, on the evidence, it was only on the second option dated 10 October 1988 that the plaintiffs could base their claim against the six defendants. The option contained sufficient essential terms for it, in ordinary circumstances, to become a binding or absolute contract upon payment of the required sum by the due date, whether or not a formal and elaborate sale and purchase agreement was to follow.

[31] The plaintiffs, however, in their brief seven-paragraph statement of claim, did not plead the option as the basis of their claim but pleaded instead

an oral agreement of the same date and terms as to price and payment of ten per cent of the total purchase price as in the option. This may be seen in paras 3 and 4 of the statement of claim. But there was no evidence of any oral agreement. There was only the option, the second option. It would appear as though the drafter of the statement of claim treated the option as an oral agreement, because if references to the alleged oral agreement throughout the statement of claim were to be substituted with references to the option, the statement of claim would reflect the actual position.

[32] The six defendants, however, knew that they had to answer a claim based on the second option. This may be seen in their reply to para 6 of the statement of claim where the plaintiffs averred that, despite requests by the plaintiffs, the six defendants failed to take any steps towards completion of 'the said agreement', which, according to the statement of claim, was the alleged oral agreement. The six defendants' reply in para 6 of their amended defence was to admit that there were requests by the plaintiffs for completion of 'the alleged agreement' while, however, contending they were not obliged to comply for reasons given earlier in the amended defence. By admitting that there were requests for completion of 'the alleged agreement' the six defendants evinced their understanding or acceptance that the agreement alleged by the plaintiffs was the option. Although para 4 of the amended defence denied para 3 of the statement of claim, which is the paragraph that introduced the oral agreement allegedly made through Raya Realti, the denial was not a denial that made an issue of the form of the agreement, but was a denial of the existence of any agreement on the part of the six defendants on the ground that Raya Realti were not acting as their agent. The six defendants therefore knew the case that they had to meet and were not embarrassed or misled by the plaintiffs' averment of an oral agreement.

[33] In the High Court, the submissions were in writing. As between the plaintiffs and the six defendants, the six defendants submitted first. It is apparent from the written submission of their counsel that although the statement of claim pleaded an oral agreement, counsel recognised from the evidence that it was the second option that was the basis of the plaintiffs' claim, and no issue was made of the failure to plead the option. It was in his written submission in reply to the plaintiffs' written submission that the six defendants' counsel made an issue of the failure to particularise the oral agreement and plead the option.

[34] The learned trial judge in his judgment paid no heed to the issue, probably treating it as of no significance, and adjudged the case on the basis that the plaintiffs' claim was 'premised on the option document'. The Court of Appeal, however, took the view that the trial judge's 'failure to consider the pleaded case', that is, the case as based on an oral agreement, 'but deciding

on an unpleaded case', that is a case as based on the option, 'is a clear misdirection', on account of which the appellate court 'has a duty to intervene'.

[35] The submission of the plaintiffs' counsel in this court on this matter of pleading was, to our understanding, that there was actually no oral agreement, but the alleged oral agreement was merely a notional emanation from the option that was necessary to bring into the pleading, which was admitted to be inelegant, in a situation in which there was no formal written sale and purchase agreement. It is as though the thinking was that in the absence of a formal sale and purchase agreement there could only have been in existence an oral agreement. The option, so went the submission, was merely evidence of the existence of an oral agreement, and evidence is never pleaded in a pleading.

[36] Question 1, which is predicated primarily on the existence of an oral agreement, might be answered in the affirmative as a general question, but the answer cannot serve the case of the plaintiffs because in their case there was no oral agreement or sale and purchase by way of an oral agreement.

[37] Nevertheless, in our judgment, the learned trial judge was right in not paying heed to this pleading issue, and we do not agree with the Court of Appeal that he had misdirected himself in this respect. The purpose of a pleading is to enable the other party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. In this case, as we have shown, the plaintiffs' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the very outset they knew that it was the second option that was the true basis of the plaintiffs' claim. This is nothing but a trivial issue.

QUESTION 2

[38] Question 2 is as follows:

> (2) In a case of sale and purchase of land, when there are two options given by the vendor to two different parties, can the one option be treated as conditional upon non-performance of the other option.

[39] In para 2 of their amended defence to the plaintiffs' claim the six defendants averred that prior to the granting of the second option Raya Realti had represented to the plaintiffs that their option had to be conditional and subject to the prior rights of the holders of the first option. This averment was

supported by the evidence of Rajandran a/l Kovalpichay, the sole proprietor of Raya Realti, who said that when he gave the option he made it clear to the plaintiffs that it was a conditional option to become effective if the intervener-plaintiffs 'failed to complete the transaction'. He explained that despite having given the first option, he nevertheless gave the second option because 'as an agent I wanted a back up in case the interveners could not proceed with the purchase of the land'.

[40] The learned trial judge did not address the question of the second option being conditional on the first option. The Court of Appeal, however, said as follows:

> ... I find the learned trial judge failed to address this aspect of the case. In fact on this point evidence was led by (Raya Realti) through its witness, Rajandran a/l Kovalpichay (DW2) (see pp 333–335 of appeal record Vol II)). It is my judgment had the learned trial judge adequately approached this point as an issue before him, he would have found that the facts do not support his finding that there was a concluded contract. This is because at that point of time when the offer under the said option was said to be made by the plaintiffs, the offer by the first and second intervener plaintiffs under the same said option was still subsisting. It is my considered view when the condition in the said option is not satisfied there can be no concluded contract (see the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy* [1966] 3 MLJ 385).

[41] The gist of the submission of the plaintiffs' counsel on question 2 is that the second option cannot be treated as conditional upon the non-performance of the first option because the two options must be construed according to their terms and there was no term in the second option that provided that it was a conditional option. Counsel submitted that it was a misdirection on the part of the Court of Appeal to rely on the evidence of Rajandran to find that the second option was subject to the first option because in so relying the Court of Appeal 'disregarded the strictures' of ss 91 and 92 of the Evidence Act 1950.

[42] The plaintiffs' counsel also sought to show, by reference to other aspects of Rajandran's evidence and in the light of the evidence of other witnesses, that the Court of Appeal ought not to have accepted as factual Rajandran's evidence. But this is a question of fact which question 2 gives us no warrant to examine for the purpose of finding that the Court of Appeal was not justified in relying on the evidence of Rajandran. We have to proceed on the basis that, as the Court of Appeal accepted, Rajandran did tell the plaintiffs that the option was a conditional option. What we have to consider for question 2 is whether, as contended by the plaintiffs' counsel, the Court of Appeal, in relying on the evidence of Rajandran, acted contrary to ss 91 and 92 of the Evidence Act 1950.

A **[43]** In our opinion they did not. Those sections are concerned with, inter alia, 'the terms of a contract' that 'have been reduced by or by consent of the parties to the form of a document'. The option was a conditional contract: see *Subramaniam Chettiar & Ors v JC Chang Ltd* [1969] 2 MLJ 176. Section 92 would preclude the admission of evidence of any oral agreement or statement
B for the purpose of contradicting, varying, adding to, or subtracting from the terms of the option, but there are exceptions. Proviso (c) to the section provides that 'the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract ... may be proved'. The legal effect of what Rajandran told the
C plaintiffs is that before the six defendants would be bound by any obligation under the second option to honour it, the first option must first fail to be exercised. The failure to exercise the first option was the condition precedent to the attaching to the six defendants of their obligation under the second option to honour it. The proviso allows proof to be given of a separate oral
D agreement constituting the condition precedent. That there was such an oral agreement in this case is to be inferred from the fact that when granting the option Rajandran imposed the oral condition and the plaintiffs nevertheless accepted the option.

E **[44]** As the second option was subject to the first option, and as the first option was exercised in time, the second option ceased to be binding on the six defendants.

F **[45]** Question 2 is actually inappropriate for this case. It assumes, without more, the existence of two options given to two different parties. It overlooks the fact that in this case, as the Court of Appeal found, one option was in fact conditional. As it stands, the question might well be answered in the negative. But one option could, as in this case, be made conditional upon the
G non-exercise of the other. Indeed it is important that it should be so made, so that the vendor would not end up being liable to two purchasers.

[46] We therefore dismiss the plaintiffs' appeal without having to deal with question 3, which relates to the question of payment of the ten per cent of
H the total purchase price by the plaintiffs and which is as follows:

> (3) Whether (the) court is entitled to rely on the opinion of a text book to arrive at a finding of fact as to when a cheque is cleared.

I **[47]** Since the outcome of these appeals is that the plaintiffs fail in their claim and the intervener-plaintiffs succeed in theirs, it follows that the plaintiffs' appeal against the Court of Appeal's dismissal of their cross-appeal in the Court of Appeal for specific performance automatically fails, and there

is no need to consider the submissions on the question who, as between the plaintiffs and intervener-plaintiffs, should be granted specific performance.

[48] To conclude, we allow the appeal of the intervener-plaintiffs (the holders of the first option, Sundaram a/l Marappa Goundan and Selva Balan a/l Sinnan) with costs against the six defendants here and in the Court of Appeal and set aside the order of the Court of Appeal setting aside the order of specific performance made in favour of the intervener-plaintiffs. We dismiss the appeal of the plaintiffs (the holders of the second option, Karuppannan a/l Ramasamy and Amchiappan a/l Sellapan) with costs for the six defendants. This means, as regards the plaintiffs' private caveat, that the Court of Appeal's order for its removal is extant. We also dismiss the plaintiffs' appeal as regards specific performance, which was a fight between the plaintiffs and the intervener-plaintiffs, but we order no costs for the intervener-plaintiffs. We order a refund of the intervener-plaintiffs' deposit and order that the plaintiffs' deposit be paid to the six defendants to account of their taxed costs.

The intervener-plaintiffs' appeal against the defendants allowed with costs here and below. The plaintiffs' appeal dismissed with costs to the defendants. Plaintiffs appeal against the intervener plaintiffs dismissed with no order as to costs.

Reported by Kanesh Sundrum